1957

East Coast Discount Corporation v. Bryce Reynolds et al : Brief of Appellants

Utah Supreme Court

In the Supreme Court of the State of Utah

EAST COAST DISCOUNT CORPORATION, a Corporation,
Respondent,

vs.

BRYCE REYNOLDS and DARWIN NEUENSCHWANDER, d/b/a REYNOLDS SAND & GRAVEL COMPANY, a co-partnership and BRYCE REYNOLDS and DARWIN NEUENSCHWANDER, Individually,
Appellants.

Case No. 8693

BRIEF OF APPELLANTS

BENJAMIN SPENCE
Appellant's Attorney

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STATEMENT OF FACTS

On September 22nd, 1952, the Appellants signed a written contract with the Carbozite Protective Coatings Inc. by its representative, N. Newman, (Tr. 52) whereby the Appellants were granted the exclusive right to sell the products of the said Carbozite Protective Coatings Inc. in the Town of Sandy and Trading Area. The merchandise ordered in the contract was

shipped to the defendants but not paid for by them at the time. At a later date another representative of the Carbozite Protective Coatings Inc., came to defendants and advised them they had to have additional merchandise in order to proceed with their sales and make their demonstrations. At that time six trade acceptances were presented to the defendants which were signed by the defendants and the merchandise accordingly shipped to them by the Carbozite Protective Coatings Inc., but the trade acceptances were not paid by defendants. In view of this case being decided at the pre-trial of the case, there was no testimony given for reasons of not paying the trade acceptances, but the facts are, that the defendants had a defense for non payment of these trade acceptances, as outlined in their answer to the complaint of the plaintiff (Tr. 10).

That before maturity, as alleged in plaintiff's complaint, these trade acceptances were negotiated by the Carbozite Protective Coatings to the plaintiff herein, (Tr. 8-9), and suit was instituted by the plaintiff as assignor or purchasers of these trade acceptances, against the defendants and the case being at issue was called for pretrial.

At the pre-trial, the contract between the Carbozite Protective Coatings Inc. and the defendants was introduced in evidence (Exhibit 1, Tr .52). An informal discussion was had between the court and the respective attorneys for the parties to the action. In view of the fact that the suit was instituted by the Assignee of the Carbozite Protective Coatings Inc., as holders in due course, the defense of defendants to the original contract between themselves and the Carbozite Protective Coatings Inc. would be excluded under rules of evidence,

therefore the defendants had to rely upon the defense that the Carbozite Protective Coatings was a foreign corporation doing business in the State of Utah, without complying with the provisions of Chapter 8, paragraphs 16-8-1-2-3—Utah Code Annotated 1953.

The court considered the contract and asked defendant's attorney if that was the only defense, or if other evidence could be introduced to show that the Carbozite Proective Coatings Inc., was doing business in the State of Utah without complying with the provisions of the Code. The reply was by the defendant's attorney that one other such contract could be introduced as evidence that said Carbozite Protective Coatings Inc., was dealing with another party and that was all of the evidence the defendants could produce at that time. The provisions of the contract was dismissed by the court and the attorneys for the respective parties, and the matter was taken under advisement and continued to a further date for further consideration thereof. At the next hearing on the pre-trial, the court after considering the matter, entertained a motion for judgment on the part of the plaintiff and the judgment was accordingly entered in favor of the plaintiff and against the defendants on the 2nd day of January, 1957 (Tr. 41-42-53). No findings or conclusions of law apparently were filed.

Within the time allowed by law, and on or about the 1t1h day of January, 1957 the defendants filed a motion for a new trial supported by affidavits. The motion was based upon the statutory grounds of newly discovered evidence that could not have been reasonably produced at the hearing of

the pre-trial, setting forth the facts that the defendants by mere chance had discovered a continuation of business activities of the Carbozite Protective Coatings Inc., in the State of Utah. Additional affidavit of the defendants certified that defendants had by chance discovered some twenty-two additional parties that the said Carbozite Protective Coatings Inc. had done business with under identical or similar circumstances they had done business with the defendants, which evidence could not have been produced as evidence at the original hearing or pre-trial, as disclosed by said affidavits of the defendants in support of its motion and its amended motion for a new trial (Tr. 44-45-46-47-48-49). The court took the motion under advisement and permitted defendants to file a brief thereon. After the brief was filed and consideration given thereto the court denied the motion for a new trial and defendants now appeal to this court.

STATEMENT OF POINTS

POINT ONE

THE COURT ERRED IN GRANTING THE MOTION OF THE PLAINTIFF FOR JUDGMENT AT THE PRE-TRIAL OF SAID CAUSE, IN FAVOR OF THE PLAINTIFF AND AGAINST THE DEFENDANTS.

POINT TWO

THE COURT ERRED IN DENYING THE MOTION OF THE DEFENDANTS FOR A NEW TRIAL BASED UPON NEWLY DISCOVERED EVIDENCE WHICH

COULD NOT REASONABLY BE PRODUCED BY THE DEFENDANTS AT THE TIME OF THE PRE-TRIAL OF SAID MATTER.

ARGUMENT

POINT ONE

THE COURT ERRED IN GRANTING THE MOTION OF THE PLAINTIFF FOR JUDGMENT AT THE PRE-TRIAL OF SAID CAUSE, IN FAVOR OF THE PLAINTIFF AND AGAINST THE DEFENDANTS.

The judgment in this case in favor of the plaintiff and against the defendants apparently was decided by the court solely upon the theory that the plaintiff's assignor, the Carbozite Protective Coatings Inc. was soliciting business and selling merchandise in interstate transactions. At least that is the only conclusion that can be drawn by reason of lack of findings of fact and conclusions of law lacking in this matter and the further failure of the court to enter a pre-trial order setting forth its reasonings or conclusions upon which judgment was entered herein.

The court apparently overlooked the provisions of the contract entered into by and between the defendants and the plaintiff's assignor, Carbozite Protective Coatings Inc., by failing to take into consideration the provisions of said contract with respect to what said corporation was to do in assisting the defendants to market its products, among which were certain circulations of its advertisements; advertising in local papers, sending a representative of said company to assist the defend-

ants in making contact with prospective customers and instructing the defendants in the application and sale of said products. The contract was signed and accepted in behalf of said corporation by its authorized agent and the contract was consummated and closed in the State of Utah without having to be approved by any other representative of said company.

The trade acceptances upon which this suit is based, having been assigned to the plaintiff herein, before the due date, and the plaintiff being a holder in due course, it is presumably the law that any defeense the defendants may have to a breach of the contract entered into by the plaintiff's assignor and the defendants would be, according to the rules of evidence, cut off. This resolves the matter down to whether the Carbozite Protective Coatings Inc., was doing business as a foreign corporation in the State of Utah, without having complied with the laws of the State of Utah, as provided by Sections 8-1-2-3 U.C.A. 1953. If they were doing business as defined by that statute and the court so determined they were doing business, then such a contract is void as to all subsequent holders, in due course or otherwise. We will therefore confine this point of our argument to that question.

The defendants are well aware of the fact that this court has decided that isolated transactions by such a corporation in the State of Utah is not doing business within the contemplation of the statute, or that interstate transactions by such a corporation is doing doing business, but this court and other courts have likewise decided that a continuation of such transactions could readily be construed as doing business in the state.

We respectively submit to the court the provisions of the contract between the Carbozite Protective Coatings Inc., and the defendants as follows:

> "POWER OF ATTORNEY: The Dealer is hereby given Power of Attorney to replace any material necessary to his customers, in accordance with the terms of the Guaranty and the Company will replace to him free of charge replacements made by the Dealer."

While this power of attorney is limited, it nevertheless authorized and directs the dealer to act for and in behalf of the Corportaion and to perform in behalf of the Corporation local acts in furtherance of its business.

> "ADVERTISING: The Dealer will submit a list up to 200 names of commercial, home or farm property owners in his territory, on the Company's form, which will be circularized in his behalf by the company at their expense, enclosing therein a return request for samples, addressed to the Dealer."

The Company will circularize these forms in behalf of the dealer by the Company at their expense. Another local activity on the part of the Company constituting doing business in the state pursuant to decisions of the court hereinafter referred to. If a corporation cannot do these local acts by reason of the prohibition of the statute directly, they cannot do this indirectly by merely constituting, or naming its agent as a dealer.

> "NEWSPAPER ADVERTISING: The Company will share with the Dealer fifty-fifty in the cost of newspaper advertising. Mats for this purpose will be supplied by the Company, gratis, upon request."

Another local act to be performed by the company through its agents, called the dealer. Even supplying the advertising.

"SALES COOPERATION: Upon the written request of the Dealer and at a date mutually agreed upon, or at an earlier date if the Company can arrange it, the Company will send a representative at their expense to make calls with the Dealer or his representative on any prospects he may have at the time of such visit."

As additional act of a local nature, sending its own agents into the State to make such sales, by using the Dealer as a subterfuge. This is all in furtherance of selling its products in the state. The mere fact that the Company attempts to use the dealer in this manner does not do away with the fact that the company is actually making its sales in the state, without being subject to taxation, licenses and other regulations of the law pertaining to doing business in the state, in competition with local corporations who are subject to such regulations.

The foregoing provision of this contract is going beyond the decisions of the courts, wherein the courts have held that certain sales are in interstate commerce and in support of this let us consider the following authorities:

McGriff v. Charles Antell, Inc., 256 P.2nd 703, Utah.

"In determining whether a foreign corporation is doing business in a State for jurisdictional purposes, each case factually must be examined as it arises. A hard and fast formula cannot determine every case. Common sense must dictate the result."

Normandie Oil Corp. v. Oil Trading Co., 163 S.W. 2nd 179.

"And where a non-resident corporation performs an act of local nature even when that act is part of a contract for the sale of goods in interstate commerce,

the act is intrastate, and is subject to regulation by the State. 246 U. S. 500, 142 S. W. 1157."

Merchant v. National Reserve Co. of America, 137 Pac. 2nd 332, Utah.

"The constitution applies to all Corporations. In our opinion the constitution reasonably contstrued, was intended to prohibit corporations from transacting their ordinary corporate business within the state without first complying with its terms—and was not intended or designed to prohibit the doing of one single act of business by such foreign corporation with *no apparent intention to do any other act,* or to engage in corporate business.

The general conclusions of the courts is that isolated transactions, commercial or otherwise, taking place between a foreign corporation domiciled in one state and citizens of another state, are not a doing or carrying on of business by the foreign corporation within the latter state, but that these prohibitions are leveled against the act of foreign corporations entering the domestic state by their agents, *and engaging in the general prosecution of their ordinary business therein.*

In Booth & Co. v. Weigand, 83 Pac. 734 (Utah) discussing the above statutory and constitutional provisions, the court said: "The words doing business, as used in these provisions, refer to a general transaction of business, and not to an isolated transaction, or to a single or wholly collateral acts. The statute obviously relates to some regular or customary business." Citing certain cases therein the court further says: "The question now presented is, What is meant by transacting business? The best definition we can think of for this phrase is the doing or performing a series of acts which occupy the time, attention, and labor of men for the purpose of livelihood, profit, or pleasure. It is well

established upon authority that doing of a single act pertaining to a particular business or transaction will not be considered carrying on, transacting or doing business. The mere term itself implies more than one transaction."

"If in fact the corporation is here, if it is here, not occasionally or casually, but with a fair measure of permanence and continuity, then, whether its business is interstate or local, is within the jurisdiction of our courts . . . But there is no precise test of the nature or extent of the business that must be done. All that is required is that enough be done to say that the corporation is here. As was said in International Harvester Co. v. Kentucky, 234 U. S. 579, each case must depend upon its own facts."

It is thus apparent that it is not any activity of a corporation in a state other than its residence which will justify the conclusion that it is doing business there . . . *but it is the combination of local activities* conducted by such foreign corporation, their manner, extent and character, which becomes determinative of the jurisdiction question.

Isolated transactions do not constitute a doing business within the meaning of the statute; it contemplates a more or less continuing course of business.

Normandie Oil Corp. v. Oil Trading Co., 163 S.W. 2nd 179 (Texas).

"When a non-resident corporation performs an act of a *local nature* even when that act is part of a contract for the sale of goods in interstate commerce, the act is intrastate, and is subject to regulation by the State. 246 U. S. 500, 142 S. W. 1157.

Haggerty v. National Fura nd Tanning Co., 162 N.W. 1068, (Minn.)

Foreign corporation sends agents into Minn. to solicit business and make contracts. A dispute arose out of a failure to fulfill the contract and a resident filed action serving one of these salesmen. The defendant corporation contends it is not doing business in the state and the service on the salesman not binding on the corporation, the court said:

"From the correspondence between the parties it clearly appears that these traveling agents had authority to make tentative contracts in this state, defendant only reserving the right to pass on the sufficiency of the estimate of price for work made by the agent. From the receipts given and the contract made by the agent in this instance apparently ratified by the manager, the agent seemed to have full authority to close the contract. The transaction with plaintiff cannot be regarded as the only business done by the defendant in this state.

We must infer that such transactions were numerous from the fact that these traveling salesmen must have subsisted on the commission earned, there being no suggestions that they had any other means of support. We do not, however, apprehend that the volume of business is at all material, nor in what manner it is done, nor how those who transact the same for defendant were compensated. The fact remains defendant was doing business when it sent its traveling salesman into this state and when, in August 1915, plaintiff at Farmont made her contract, with one of them and delivered to him her coat. It apparently was pursuing the same business when on September 1916, it sent another of its traveling salesmen to her residence with the garment to adjust the claimed liability upon this contract. Penn Lumbermens Mutual Fire Ins. Co. v. Meyers, 197 U. S. 407. A fire insurance company which issues policies upon real estate, and personal property situated in another state is as much engaged in its business when

agents are there under authority adjusting the losses, covered by its policies as it is when engaged in making contracts to take such risks."

Irons v. Simeon L. & George H. Rogers, 166 Fed. 781.

"I do not understand that the N. Y. representative merely transacts offers to buy goods to the Connecticut Factory where the defendant decides whether it will accept or reject them, but that such representative makes binding contracts with purchasers, and sends to Connecticut merely directions where to ship the goods. If this be so, the case is similar to Cone v. Tuscaloose Mfg. Co., 76 Fed. 891, and the motion is denied. If the defendant believes it can show that the agent is merely soliciting who has no power to contract, and will pay the expense of the hearing before a master to establish that fact, an order of reference will be made."

Priggs v. Selz Schwab & Co., 138 N.W. 975.

"Defendant is an Illinois Corporation which manufactures shoes and sells them to retail dealers. It also arranges for the operation in various localities of what are known as Sels Royal Blue Stores. When an arrangement is made to operate one of these stores, defendant enters into a contract with the dealer which provides that the store shall be known and advertised as the dealer's Sels Royal Blue Shoes, etc. . . . We think defendant was doing business in this state and that such service was valid under the rule established in the following and similar cases: 151 N. W. 917; 152 N. W. 410; 234 U. S. 579.

International Harvester Co. v. Commonwealth of Kentucky, 234 Fed. 579.

"When a corporation of one state goes into another, in order to be regarded as within the latter it

must be there by its agents authorized to transact business in that state . . . each case must depend upon its own facts, and there consideration must show that this essential requirement of jurisdiction has been complied with, and that the corporation is actually doing business within the state. Here was a continuous course of business in the solicitation of orders which were sent to another state, and in response to which the machines of the International Harvester were delivered within the state of Kentucky. This was a course of business, not a single transaction. The agents not only solicited such orders in Kentucky, but might there receive payment in money, checks, or drafts. They might take notes of customers which notes were made payable, and doubtless were collected at any bank in Kentucky. This course of conduct of authorized agents within the state in our judgment constituted a doing of business where in such wise that the Harvester Co. might be fairly said to have been there doing business and amenable to process of the courts of that State."

I respectfully submit to the court that the foregoing case, pertaining to the facts, is identical with the case now before the court, but the case now before the court is of a stronger nature. The Carbozite Protective Coatings Inc., not only took notes of its customers, commonly called "trade acceptances" payable at any bank in Utah on which it was sent through, but the company agreed by its contract to do acts of a local nature as outlined by the contract and heretofore set forth hereinabove. Actinoo Laboratories, Inc., v. Lamb, 278 N.W. 234 (Iowa).

"The order for the sale of the machine in question expressly provides that it was not subject to countermand or recission. The order contained no limitation that it was subject to acceptance. The order contained no limitation that it was subject to acceptance or ap-

proval by the Company in Chicago, nor was any testimony offered tending to show any such understanding. On the contrary, all of the evidence points to but one conclusion, and that is that the contract of sale was execuetd and accepted by the president of the plaintiff company and machine delivered in the City of Des Moines, Iowa, by Dr. Loeb. The evidence shows that plaintiff was doing business in the State of Iowa and the facts in this case bring it squarely within the prohibition of our statute."

Imperial Curtain Co. v. Jacobs, 127 N.W. 772 (Michigan).

"Held that where plaintiff, a foreign corporation not having complied with the laws of Michigan, procured an advertising contract through traveling salesman from defendants, to be performed in Michigan by the insertion of defendant's advertisement on a drop curtain in a theatre, the plaintiff in performance of the contract, prepared an advertisement in Philadelphia and shipped it to Detroit where it was placed on a curtain, such contract related to business of a purely local nature not amounting to interstate commerce, and was therefore unenforceable."

LaPorte Heinekamp Motor Co. v. Ford Motor Co., 24 Fed. 2d 861.

"That which the agent of the defendant did in Maryland was soliciting of business, and something more. It is well settled that solicitation alone is insufficient to constitute doing business in a technical sense. Green V. C. B. & O. Ry., 205 U. S. 530. On the other hand it has been held that where there is a continuous course of business in solicitation of orders by a foreign corporation, which were sent to another state, and in response to which goods of hte corporation were delivered within the state, and the agent not only solicited orders in money, checks, or drafts and took the notes of customers, payable and collectible at banks

within the State, there was a doing business which would subject the corporation to suit within the State. 234. U. S. 579, 3 Fed. 2d 520.

Colorado Iron Works v. Eierra Grand Mining Co., 25 Pac. 325.

"On the contrary I think justice requires that they shall be subject to the action of the courts of the state whose comity they thus invoke. For the purpose of being sued, they ought in such cases to be regarded as voluntarily placing themselves in the situation of citizens of that state. Any nautral person who goes into another state carries along with him all his personal liability; and there is quite as much reason that a corporation which chooses to open an office and transact its busines, or to authorize contracts to be made in another state, should be regarded as thereby voluntarily submitting itself to the action of the laws of that state, as well in reference to the mode of commencing suits against it as to the interpretation of the contracts so made.

It must be regarded as the settled law of this state that, if a corporation makes a contract in a state other than that in which it was chartered, it thereby submits itself to the jurisdiction of such foreign sovereignty so far as to be liable therein in regard to that contract when summoned according to the laws of the state. (Citing other cases) where the same general principles are recognized and asserted; and the same may be said of the courts of the states and that in England the same jurisdiction is asserted over foreign corporations."

John Deere Plow Co. v. Myland et al., 76 Pac. 863 (Kansas)

(Suit on a promissory note for merchandise purchased.) "Although the record in each case discloses but one transaction of the corporation that transaction was not merely incidental or casual. It was part of the very business to perform which the corporation existed

> It did distinctly indicate a purpose on the part of the corporation to engage in business within the State, and to make Kansas a part of its field of operation, where a substantial part of its ordinary traffic was to be carried on. Therefore, although a single act, it constituted a doing of business in the state within the meaning of the Statute."

There are numerous cases which reach the same conclusions of those set forth hereinabove but we think the foregoing is a fair example of what the law is, and to cite others would be merely accumulative.

It may be concluded or assumed that the court in deciding this case in favor of the plaintiff and against the defendant, the court labored under the presumption tha this was an isolated transaction inasmuch as defendants could not at the time produce more than two instances of such contract solicited in Utah, at that time, due to lack of obtaining other evidence and that such was a mere solicitation which some courts have decided is in interstate commerce, but the court utterly failed to take into consideration the obligations on the part of the plaintiff's assignor to perform acts of purely a local nature and performing acts and duties which take this case out of the realm of purely solicitation. Even though this may be considered as an isolated transaction of one or two contracts, it surely comes within the meaning of the law as outlined in the cases hereinabove set forth. We must assume that the court in deciding this case on pre-trial took this attitude in view of the fact that the court failed to make a pre-trial order herein or failed to make and file findings of facts and conclusions of law.

POINT TWO

THE COURT ERRED IN DENYING THE MOTION OF THE DEFENDANTS FOR A NEW TRIAL BASED UPON NEWLY DISCOVERED EVIDENCE WHICH COULD NOT REASONABLY BE PRODUCED BY THE DEFENDANTS AT THE TIME OF THE PRE-TRIAL OF SAID MATTER.

Within the time prescribed by the rules of Civil Procedure the plaintiffs filed a motion for a new trial based upon the grounds: "Newly discovered evidence, material for the party making the application, which they could not, with reasonable diligence, have discovered and produced at the trail." This motion and its amendments were supported by affidavits of the plaintiff disclosing why such evidence could not be produced at the pre-trial or at the trial of the case had a trial been permitted. (Tr. 44-45-46-47-48-49).

The discovery of this evidence, as shown by the affidavits of one of the defendants shows that the additional evidence, which defendant desired to produce was discovered purely by accidental means and that he diligently pursued the lead that he obtained, and by diligently pursuing this lead he discovered that the plaintiff's assignor, the Carbozite Protective Coatings Inc., had been procuring these contracts from numerous parties within the state of Utah and other states over several years by its agents, and its pursuit of business and activities were practically the same in each case. Had the defendants been granted a new trial, this evidence could have been readily produced to show that the case now before the court was not an isolated transaction but a continuity of business in the state

on the part of this corporation. Defendants could have produced evidence to show that the Carbozite Protective Coatings Inc., had stored some of its merchandise in a warehouse in Salt Lake City, Utah, and was carrying on an active business within the state. To deny the defendants' motion for a new trial was depriving the defendants of their day in court and it was error on the part of the court to reach such a decision based merely upon a conclusion.

At a continuation of the hearing of the pre-trial date, the defendant appeared in court to testify of his diligence in procuring the evidence that he wished to produce at the trial, in support of his affidavit and how he accidentally discovered the additional evidence, which he could not have done with due diligence before this pre-trial, or the trial of the case had a trial been had, but apparently the court concluded from the discussion had at the pre-trial that such evidence would not be material, when in fact it would show a continued business activity on the part of the plaintiff's assignor within the State of Utah. See discussoin at the pre-trial (Tr. 33-34-34½-35-36-37). I am assuming the court concluded this which should probably have been shown by a pre-trial order and filing of findings of act and conclusions of law, which are lacking in the case. Defendant was not permitted to testify in support of his affidavit for a new trial. This, in our opinion, was an abuse of discretion of the court.

Jensen vs. Logan City, 57 Pac. 2d 708 at 723 (Utah).

> "Where disinterested testimony on the vital point in a case is very scant, newly discovered testimony on that point appearing from affidavits in support of the mo-

tion for a new trial to be apparently reliable, when it appears that the movant for the new trial was not guilty of indiligence in failing to obtain the witness for the trial, and that there is no element of holding such witness in reserve for purposes of obtaining a new trial — generally picturesquely denominated in slang phraseology as "an ace in the hole"—and it appears likely that such evidence would change the result, a new trial should be granted. While the granting or refusing of the motion lies in the sound discretion of the court, where there is grave suspicion that justice may have miscarried because of the lack of enlightenment on a vital point which new evidence will apparently supply, and the other elements attendant on obtaining a new trial on the grounds of newly discovered evidence are present, it would be an abuse of sound discretion not to grant the same."

CONCLUSION

The appellant respectfully submits:

(a) That plaintiff's assignor, the Carbozite Protective Coatings, Inc., was and is presently doing business in the State of Utah as a foreign corporation not authorized to do business within this state. It was stipulated by counsel for respondent that said Carbozite Protective Coatings Inc., was a foreign corporation not qualifying to do business in Utah. (Tr. 24).

(b) The contract itself, Exhibit "A" (Tr. 52), requires the said corporation to perform acts of purely local nature, advertising, furnishing advertising material for its jobbers; agreeing to send representatives into the state to assist in the sale af its merchandise.

(c) Taking notes of its jobbers, (trade aceptances) which are payable and collectable in local banks.

(d) Entering into contracts within the stateof Utah by its duly authorized agents, then violating the provisions of said contracts, then assigning its contracts to third parties, who apparently are holders in due course, for the purpose of suit and evasions of its obligations, or preventing defendants from asserting their defense thereto, without having to go to the expense of suing thereon in the home state of said corporation.

(e) If each case is to be decided upon its own facts, as decided by our Supreme Court and other states, I respectfully submit that the facts of the case now before the court clearly falls within the preview of the cases in their brief submitted, and the court should find that the said Carbozite Protective Coatings Inc., the plaintiff's assignor, is doing business within the State of Utah, and their contracts should be held void by reason of the statute of the State of Utah made and provided in such cases.

(f) That the court abused its discretion in denying the defendants' motion for a new trial to produce newly discovered evidence which could not be produced at the time of the pre-trial with diligence on the part of the defendants, to show a continued business on the part of the plaintiff's assignor within the state of Utah and elsewhere.

Respectfully submitted,

BENJAMIN SPENCE
Appellant's Attorney